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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL PICKERING, Cross-Complainant and Respondent, v. COAST CENTER FOR ORTHOPEDIC ARTHROSCOPIC SURGERY & TREATMENT, Cross-Defendant and Appellant.	D051679 (Super. Ct. No. GIC839999)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey B. Barton and Lillian Y. Lim, Judges. Affirmed.

Coast Center for Orthopedic Arthroscopic Surgery & Treatment, L.P., dba Coast Surgery Center (Coast) appeals a judgment entered in this action in favor of Michael Pickering on his cross-complaint against it for violation of the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq. (the Federal Act)) and the California Robbins-Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq. (the State Act)) and fraud. Coast contends that (1) as a matter of law, it has no liability for

violations of the Federal Act or the State Act and (2) there is no substantial evidence in the record to support the jury's finding that it committed fraud. We find its arguments unavailing and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Pickering was involved in an accident in which his car was rear-ended by a transit bus and was treated in a hospital emergency room. At that time, he was covered by health insurance issued by AEtna US Healthcare (Aetna) and, at Aetna's request, he provided it with information regarding the accident. Aetna paid insurance benefits on the treatment that Pickering received for his injuries.

Pickering continued to suffer from pain and numbness in his neck, arms and legs and sought additional treatment for those problems. After initial treatment options and physical therapy proved unsuccessful, Pickering was referred to Dr. Richard Ostrup, a neurosurgeon who was also a limited partner in Coast. Dr. Ostrup ran a number of diagnostic tests on Pickering and recommended neck surgery. Dr. Ostrup assured Pickering that the outpatient surgery would be covered by Pickering's health insurance.

In March 2003, Pickering went to the Coast facility for his surgery; Coast accepted his insurance and had him sign an agreement assigning his benefits under the Aetna policy to it. Pickering also authorized Coast to bill his credit card for the patient portion of the applicable charges as determined under Coast's contract with Aetna.

Pursuant to the contract between Coast and Aetna (the Contract), Coast was required to accept reduced rates for its services to Aetna insureds and to charge those patients 10 percent of the reduced rate amount. The Contract required Coast to submit claims for

payment from Aetna within 90 days of the date the services were provided and prohibited Coast from charging Aetna insureds more than the Contract rates unless Coast advised the insured, before the services were rendered, of the lack of coverage and the insured agreed in writing to pay the higher rates.

After Pickering's surgery, Coast billed Aetna for those services in accordance with the Contract; Aetna made a partial payment and notified Pickering that it was claiming a lien for the surgical charges. At about the same time, Coast was contacted by an attorney who was representing Pickering in a lawsuit arising out of the underlying accident about the billing invoices for the neck surgery. Coast responded to counsel's request by asking Pickering to sign a lien in its favor for $35,716 in surgery charges, the amount that would have been owed based on Coast's normal rates rather than reduced rates required by the Contract. Pickering, however, declined to execute a lien in Coast's favor.

In response to a separate inquiry by Pickering about the billing invoices, Coast informed him that he was responsible for 10 percent of the Contract charges (for a total of $213.72), but that it was appealing Aetna's underpayment and "[a]fter we receive the additional Aetna payment, we will be able to send you your bill." Over the next few months, Coast sent Pickering statements showing the amount it was claiming from Aetna as overdue; although those bills also showed a patient obligation for a portion of the charges, Pickering believed, in accordance with Coast's earlier directive and based on the differing amounts shown in the bills as being due, that the amount of the charges for which he was responsible could not be determined until the appeal with Aetna was

resolved. Despite its representations and unbeknownst to Pickering, Coast was not pursuing an appeal with Aetna.

Pickering did not receive any statements for a ten month period, but thereafter was told by Coast that there was no coverage under his Aetna policy for accidents covered by third party insurance and that it "had to refund the money Aetna paid for the services [and] therefore . . . has not been paid" (neither of which statements was true). Coast claimed that Pickering owed it $35,090.72 (this number was the total surgical charges at Coast's normal rates, less what Aetna had paid Coast) and threatened that if he did not pay that amount within 13 days, it would refer the matter to a collection agency.

Pickering did not make the payment as demanded and in October 2004, Coast retained Lake Valley Retrievals, Inc. (Lake Valley) to collect the full $35,090.72 from him. (Coast was identified as the "originating office" rather than a "forwarding creditor" in its agreement with Lake Valley.) To facilitate the collection efforts, Coast gave Lake Valley a copy of the Contract, despite the confidential nature of that agreement. In addition, Lake Valley was in frequent contact with Coast regarding its collection efforts against Pickering.

After being contacted by Lake Valley, Pickering notified it that he did not owe the claimed amount; despite this, Lake Valley reported the full invoice as delinquent to the credit reporting agencies, damaging Pickering's credit and precluding him from getting loans he applied for thereafter. Pickering also contested the amount claimed with Coast, but Coast continued to maintain that he owed it the full $35,090.72.

Coast authorized Lake Valley to file a collection action against Pickering and in December 2004 Lake Valley did so, asserting claims for breach of contract and common counts. Within weeks, however, Coast discovered that Pickering's third party lawsuit had been unsuccessful and belatedly instituted the appeal of Aetna's partial payment.

Although Aetna ultimately provided an additional payment to Coast for Pickering's surgical services, Lake Valley continued to pursue the action against Pickering with Coast's blessing. Ultimately, however, Pickering succeeded in moving for summary judgment of Lake Valley's claims against him on the ground that Coast had never assigned it any legal interest in the debt and thus lacked standing to sue him for breach of contract.

Pickering cross-complained against Coast and Lake Valley for violations of the debt collection statutes and fraud and Coast and Lake Valley cross-complained against each other. Lake Valley sued Coast for implied, comparative and equitable indemnity, as well as contribution and declaratory relief. Coast's cross-complaint against Lake Valley asserted, inter alia, claims for negligence, breach of contract and unlawful debt collection practices, and alleged in part that Lake Valley initiated the collection against Pickering without its knowledge or consent.

Prior to trial, Coast moved for summary judgment of Pickering's claims against it, contending that, as a matter of law, it could not be held vicariously liable for Lake Valley's violations of the Federal and State Acts and that the undisputed evidence showed all of the representations to Pickering were true at the time made. The court denied the motion on the grounds that triable issues of fact remained as to whether Coast used Lake Valley as a

surrogate through which it collected the debt owed by Pickering and whether Coast made fraudulent representations to him. Lake Valley informed the court that it was insolvent and dismissed its cross-claims against Coast.

Pickering's cross-claims were tried to a jury, which issued special verdicts in his favor. It found that (1) Coast was a debt collector under the Federal and State Acts, (2) Lake Valley was Coast's agent, (3) Coast was liable for Lake Valley's violations of the Federal and State Acts, and (4) Coast had committed fraud against Pickering. It awarded Pickering $154,975.72 in damages, consisting of $16,885 in economic damages, $100,000 for pain and suffering (including emotional distress), a $3,000 statutory penalty under the Federal Act and punitive damages of $35,090.72. The court entered judgment in Pickering's favor in July 2007. After what was essentially a default proceeding, the court also entered a $154,975.72 judgment on Coast's cross-claims against Lake Valley.

Coast appeals the judgment on Pickering's cross-complaint against it.

DISCUSSION

1. *Coast's Liability under the Debt Collection Statutes*

A. The Federal Act

The Federal Act prohibits "debt collectors" from engaging in abusive, deceptive or unfair collection practices, including falsely representing "the character, amount, or legal status of any debt[.]" (15 U.S.C. § 1692e(2)(A); see generally *Heintz v. Jenkins* (1995) 514 U.S. 291, 292.) The act allows consumers who have been subjected to such practices to sue for damages and other relief. (15 U.S.C. § 1692; *Alexander v. Omega Management, Inc.* (D. Minn. 1999) 67 F.Supp.2d 1052, 1054.)

The Federal Act defines a "debt collector" as (1) "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts," or (2) "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." (15 U.S.C. § 1692a(6).) It expressly excludes certain classes of persons, such as officers, employees and most corporate affiliates of a creditor, from this definition. (15 U.S.C. § 1692a(6)(A), (B).) It also excludes "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt [that] was originated by such person[.]" (15 U.S.C. § 1692a(6)(F)(ii).)

The Federal Act's exclusion of creditors who collect their own debts is based on the recognition that creditors have a natural incentive to maintain good will with their customers and thus are less likely to engage in collection abuses and in less need of policing than those who are collecting debts from customers of another. (See *Newman v. Boehm, Pearlstein & Bright, Ltd.* (7th Cir. 1997) 119 F.3d 477, 482, fn. 3.) The statutory scheme, however, further provides that the exception for creditors does not apply (and thus the prohibitions of the Federal Act do) to a creditor who uses a name other than its own in the process of collecting its debts, thus giving the impression that a third party is collecting or attempting to collect those debts. (15 U.S.C. § 1692a(6) [providing that such a creditor is a "debt collector" thereunder].)

On appeal, Coast contends that the judgment against it must be reversed as to the Federal Act claim because, as a matter of law, it was a creditor rather than a debt

collector within the meaning of that statute. This argument, however, is unavailing for two reasons. First, to the extent that Coast is suggesting that a creditor can never be a debt collector within the meaning of the statutory scheme, the suggestion is belied by the exception for a creditor who uses a third party as a shill to cover its own collection efforts. (See generally *White v. Goodman* (7th Cir. 2000) 200 F.3d 1016, 1018 [recognizing that this exception is not limited to the situation where the creditor uses a pseudonym].)

Second, the question of whether a particular party is a "debt collector" within the meaning of the Federal Act is generally a question of fact, to be determined from the surrounding circumstances. (See, e.g., *Romine v. Diversified Collection Services, Inc.* (9th Cir. 1998) 155 F.3d 1142, 1147-1150; *Jenkins v. Heintz* (7th Cir. 1994) 25 F.3d 536, 539 [defendant's activities rather than formal status as a collection agency determine whether defendant is a "debt collector" under the Federal Act].) Accordingly, the jury in this case was instructed with the relevant law and expressly found that Coast was a "debt collector" thereunder.

For the first time in its reply brief, Coast argues that there is insufficient evidence to support the jury's finding. However, based on its belated assertion, this argument is waived. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214.) Even if it was not, the argument proves unavailing on its merits.

Evidence at trial showed that Coast was actively involved in, and exercised significant control over, Lake Valley's efforts to collect $35,090.72 from Pickering. For example, Coast's own witnesses testified that Lake Valley did not file the action against

Pickering until after obtaining Coast's authorization and that, during the short pendency of the action, Coast communicated with Lake Valley's attorneys on several occasions, as well as with Pickering and Aetna. Also, to facilitate the collection efforts, Coast gave Lake Valley a copy of the Contract, despite applicable confidentiality provisions precluding such disclosure. Further, the contract between Coast and Lake Valley permitted Lake Valley to act as Coast's agent in carrying out "normal collection procedure[s]." During the litigation, Lake Valley was in frequent contact with Coast and upon Lake Valley's discovery that Pickering had not succeeded in his underlying action arising out of the accident, Coast instructed it to "hold off" on its plans to put a lien on Pickering's property. Finally, Coast rather than Lake Valley ended up collecting on the account.

Although the overall evidence presented at trial might reasonably be reconciled with a contrary conclusion, the foregoing evidence, and the inferences drawable therefrom, sufficed to permit a reasonable jury to conclude that Coast used Lake Valley as a mere surrogate in attempting to collect more than it was entitled to under the Contract for the surgical services and thus that Coast qualified as a "debt collector" pursuant to 15 United States Code section 1692a(6)(C). (See *Nielsen v. Dickerson* (7th Cir. 2002) 307 F.3d 623, 633-639.) Accordingly, Coast's argument that the Federal Act claim is not supported by substantial evidence fails on its merits.

B. The State Act

The State Act defines "debt collector" as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." (Civ. Code, § 1788.2, subd. (c).) Unlike the Federal Act, the State Act does

not exempt creditors who collect their own debts from its application. (*Ibid*.; see also Civ. Code, § 1788.17 [generally adopting the debt collection practice requirements and remedies of the Federal Act, but not adopting the Federal Act's definitions].)

Coast requests that we take judicial notice of the legislative history of Civil Code section 1788.2; it contends the materials comprising that history establish that the statutory definition of "debt collector" includes only a creditor that is trying to collect its own debt, not one that has assigned its debts to an outside collection agency. We grant the unopposed motion but decline to rely on the noticed materials in interpreting the language of this statute because (1) Coast did not proffer such materials in the proceedings below and (2) the plain meaning of statutory language does not support such a limited application. (Evid. Code, §§ 452, subd. (c), 459, subd. (a); see *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 155-156 [noting that extrinsic sources, including legislative history, may be consulted to determine a statute's meaning, but only where the statutory language is not plain and unambiguous]; cf. *Abernathy v. Superior Court* (2007) 157 Cal.App.4th 642, 648-649.)

The State Act's definition of "debt collector" is clear and unambiguous; it does not exclude a creditor who collects its own debts. Accordingly, nothing in the statutory scheme precludes Coast from being a "debt collector" thereunder.

C. Liability for Lake Valley's Conduct

Coast also contends that even if it does qualify as a "debt collector" for purposes of the federal or state debt collection statutes, it cannot be liable for Lake Valley's conduct because Lake Valley was not acting as its agent. Again, however, the question

of whether one party has acted as the agent of another is generally one of fact (*Magnecomp Corp. v. Athene Co.* (1989) 209 Cal.App.3d 526, 536-537) and here was one that the jury resolved in Pickering's favor. The evidence described above was sufficient to support the jury's finding in this regard.

2. *The Sufficiency of the Evidence to Support a Finding of Fraud*

Coast challenges the sufficiency of the evidence to support the jury's finding that it committed fraud against Pickering. In reviewing the merits of this challenge, we must view the evidence in the light most favorable to the judgment and resolve evidentiary conflicts and indulge all reasonable inferences possible to uphold the court's finding. (See generally *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.)

Here, the evidence showed that Coast assured Pickering his insurance would provide coverage for his surgery and accepted an assignment of his rights under the insurance, without ever inquiring whether he had been in an accident for which third party insurance might provide coverage. (Moreover, the evidence also showed that the mere fact of an accident involving a third party did not render Pickering's insurance inapplicable.) Pickering testified that he relied on Coast's assurances in agreeing to have the surgery performed at Coast rather than at Scripps Memorial Hospital, where he had been seen by Dr. Ostrup beforehand and which was a preferred provider on his Aetna coverage; he further testified that, had he known of Coast's policy of charging its patients who were injured in accidents for which there might be third party coverage at its normal and customary rates despite the insurance policies, he would not have had the surgery

performed at the Coast facility. Further, there was ample evidence that Pickering suffered economic and noneconomic damages as a result of the collection activities stemming from having had the surgery performed at Coast's facility. Such evidence is sufficient to support the jury's finding that Coast was liable to Pickering for fraud.

DISPOSITION

The judgment is affirmed. Pickering is awarded his costs of appeal.

McINTYRE, J.

I CONCUR:

HUFFMAN Acting, P.J.

Aaron, J. concurring and dissenting:

I cannot agree with the majority's conclusion that under the evidence presented in this case, Coast may be held liable as a debt collector under the federal Fair Debt Collection Practices Act, 15 United States Code section 1692 et seq. (FDCPA).

As the majority acknowledges, the FDCPA exempts from the definition of "debt collector" creditors who are collecting their own debts. There is an exception to this exemption for "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." (15 U.S.C. § 1692a(6).)

The federal courts have interpreted this exception narrowly. In *Maguire v. Citicorp Retail Services, Inc*. (2d Cir. 1998) 147 F.3d 232 (*Maguire*), the court explained, "A creditor uses a name other than its own when it uses a name that implies that a third party is involved in collecting its debts, 'pretends to be someone else' or 'uses a pseudonym or alias.'" (*Id*. at p. 235, quoting *Villareal v. Snow* 1996 WL 473386 *3 (N.D.Ill. Aug. 19, 1996).) In *Maguire*, the court held that Citicorp could be held liable as a creditor where its in-house collection division, Debtor Assistance, was in fact a unit of Citicorp. The court stated, "The triggering of the FDCPA does not depend on whether a third party is in fact involved in the collection of a debt, but rather, whether a least sophisticated consumer would have the *false impression* that a third party was collecting the debt." (*Maguire*, *supra*, 147 F.3d at p. 236, italics added.)

Elaborating on this exception, the court in *Mazzei v. Money Store* (2004) 349 F.Supp.2d 651 (*Mazzei*) held that The Money Store, a lender, could not be held liable as a

debt collector under the "false name provision" of the Federal Act, noting that "[t]he FDCPA distinguishes between creditors and debt collectors, making clear that creditors are generally not considered to be debt collectors *unless the debt collector is in reality the creditor's alter ego*." (*Id*. at p. 657, italics added.)

The plaintiff in *Mazzei* argued that the debt collector, the law firm of Moss, Codilis, Stawiarski, Morris Schneider & Prior (Moss Codilis) had "exercised no legal judgment in generating the breach letters sent to plaintiff as well as to thousands of others," and that the Money Store was "the true debt collector under the false name exception contained in the FDCPA." (*Mazzei, supra*, 349 F.Supp.2d at p. 658.) The *Mazzei* court noted that The Money Store had not used a name other than its own, but rather, had hired Moss Codilis to send out debt collection letters, which Moss Codilis did, under its own name. Further, it was undisputed that Moss Codilis was "a real entity that existed and performed work for The Money Store." (*Id*. at p. 660.) The *Mazzei* court distinguished *Maguire*, noting that in *Maguire*, Debtor Assistance, Citicorp's in-house collection unit, "was part of the same economic entity as Citicorp, under its ownership and control," while "Moss Codilis . . . is neither owned nor controlled by The Money Store" and that Moss Codilis "is located in a different state than The Money Store, and has its own employees and facility with separate phone and fax numbers in stark contrast to Debtor Assistance. [¶] In short, defendants and Moss Codilis are separate businesses, operating in their own independent financial interests, as exemplified by the Letter of Agreement into which the two separate entities entered." (*Id.* at pp. 660-661.) The *Mazzei* court concluded that The Money Store could not "be considered a debt collector

under the false name exception of the FDCPA because [plaintiffs] fail to demonstrate that Moss Codilis was The Money Store's alter ego" (*id*. at p. 661), which the *Mazzei* court defined as the creditor "'control[ling] almost every aspect' of [the debt collector's] debt collection practice." (*Ibid*.)

The majority holds that the jury in this case could reasonably have concluded that "Coast used Lake Valley as a mere surrogate in attempting to collect more than it was entitled to under the Contract for the surgical services and thus that Coast qualified as a 'debt collector'" pursuant to the Federal Act, citing *Nielsen v. Dickerson* (7th Cir. 2002) 307 F.3d 623, 633-639) (*Nielsen*). (Maj. Opn. p. 9.) However, *Neilsen* is entirely distinguishable. In that case, the creditor, Household Bank, which issued credit cards, engaged Attorney Dickerson to provide legal services to Household Bank in connection with its debt collection activities. The district court found that, in reality, Household "'used Dickerson's name and letterhead' to give Household's debtors the *false impression* that someone other than Household — more particularly, an attorney — had become involved in the effort to collect the amounts that these debtors owed to Household." (*Nielsen, supra*, 307 F.3d at p. 634, italics added.) The *Neilsen* court observed, "That determination, of course, rests on the [district] court's threshold finding that Dickerson was not meaningfully involved in the collection of Household's debts." (*Ibid*.) Agreeing with the district court's findings, the Neilsen court concluded that because "Dickerson was not meaningfully involved in the effort to collect Household's debts" and "the letter he sent to Household's debtors was not truly 'from' Dickerson . . . Household should be

treated as a 'debt collector' under 15 U.S.C. 1692e(3) and (10)."[1] (*Nielsen, supra*, 307 F.3d at p. 634.)

In this case, there is no evidence that Coast used a name other than its own to imply that a third party was involved in collecting its debts, that it pretended to be someone else, or that it used a pseudonym or alias. (*Maguire, supra*, 147 F.3d at p. 235.) Nor is there any evidence that Lake Valley was under the control of Coast to the extent that Lake Valley can be deemed to be Coast's alter ego. Rather, it is undisputed that Lake Valley is a separate business entity that Coast retained to collect debts owed to Coast, and that Lake Valley in fact conducted collection efforts on behalf of Coast. Unlike in Neilsen, here there is no evidence that Coast used Lake Valley's name to give debtors a false impression that an entity other than Coast was attempting to collect the debt.

The majority's expansion of the breadth of the false name exception to apply to Coast under the circumstances of this case appears to be unprecedented, and is, in my view, an incorrect application of the law.

I concur in the remaining portions of the majority opinion.

AARON, J.

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[1] 15 U.S.C. section 1692e, subdivisions (3) and (10) establish liability for falsely representing or implying that any individual is an attorney or that any communication is from an attorney (subd. 3), and for the use of false representation or deceptive means to collect or attempt to collect a debt (subd. 10).